

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)
W.A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA,)
et al.)
)
Plaintiffs,)
)
vs.) No. 05-CV-329-GKF-PJC
)
TYSON FOODS, INC., et al.,)
)
Defendants.)

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TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS

JANUARY 14, 2010

BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
United States Court Reporter

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1 Thursday, January 14, 2010

2 * * * * *

3 THE COURT: The court has read the State
4 of Oklahoma's submission regarding proposed rebuttal
5 testimony, and the state has proposed two rebuttal
6 witnesses, Drs. Bernard Engel and Scott Wells. I see
7 the topics of the rebuttal testimony have been set
8 forth specifically.

9 Is there anything to add?

10 MS. MOLL: Good morning, Your Honor.
11 May it please the court, we don't have anything to add
12 by way of subject matters of either Dr. Engel or
13 Dr. Wells. I do have some comments prepared, if Your
14 Honor would indulge me, to walk through some of the
15 past pleadings and orders issued by the court and
16 rebuttal-related principles as set forth by the Tenth
17 Circuit and other courts.

18 THE COURT: Very well.

19 MS. MOLL: Okay. Thank you. I have
20 some written notes in a PowerPoint, a very brief one,
21 Your Honor, that I've prepared, but I just wanted to
22 speak from the heart for a moment, if I could.

23 I was up most of the night thinking about
24 where we have been and where we are and it's obviously
25 been a long road for everyone, and I appreciate the

1 time that Your Honor has put into this case and your
2 staff. I kept coming back through the night to this
3 statement that you've made repeatedly from the bench
4 which is, we are here in a search for the truth. And
5 that is precisely at the heart of today's argument.

6 We have very carefully tried to identify
7 those issues that would be appropriate for rebuttal
8 testimony by Drs. Engel and Wells. As you saw in the
9 pleading we filed last night, we made the decision to
10 withdraw our pursuit of putting on Dr. Stevenson in
11 rebuttal.

12 So we believe that our rebuttal case would
13 only take a day or a day and a half. We take very
14 seriously the amount of time that this trial has
15 taken. We don't wish to extend it any longer than it
16 needs to be. We all are looking forward to spending
17 more time with our families and getting back to other
18 cases, etcetera, and we don't wish to be here through
19 the springtime. And so we're very careful in terms of
20 identifying those topics on which we thought Your
21 Honor would benefit from further testimony from these
22 two proposed rebuttal witnesses.

23 So I just offer that comment because if we
24 truly are here in the search of the truth, to allow
25 rebuttal testimony will further that goal; to disallow

1 it, would not.

2 So let me move on to the written comments
3 that I've prepared, if I could.

4 THE COURT: You may.

5 MS. MOLL: And I'll provide a very quick
6 road map for Your Honor as to my comments, and then to
7 the extent we need to delve into any of the categories
8 that have been identified by the state, the proposed
9 categories of rebuttal testimony by Drs. Engel and
10 Wells, Mr. Page will address those because, Your
11 Honor, I can assure you you don't want me talking
12 about coefficients.

13 So I'd first like to touch upon the court's
14 prior statements regarding rebuttal prior to the
15 commencement of trial, then address very quickly some
16 of the rulings that were issued during the course of
17 trial, and then move into principles regarding
18 rebuttal as set forth by the Tenth Circuit and other
19 courts which, I think, will help guide our discussion.

20 So let me ask Gina to put up the PowerPoint
21 and let's start with slide 1.

22 Your Honor, we've put together what I have
23 called on slide 1 the docketing time line regarding
24 rebuttal. I'm happy to give Your Honor a hard copy of
25 this presentation if it would be useful to you. It's

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1 only about 14 slides. If you'd like to have a hard
2 copy, I'm glad to give you one.

3 THE COURT: If you have an extra, that
4 would be fine. I have been through the three orders
5 that are at the heart of rebuttal and will say, as we
6 sit here before argument, that it does leave the
7 matter open for argument. So if you would.

8 MS. MOLL: I've included here on
9 pages -- or slides 1, 2, and 3 the docket numbers that
10 were identified by counsel yesterday. There are a
11 couple additions, which I'll mention, which we found
12 last night after the filing and certainly after court.
13 I'll just highlight a few. I don't want to belabor
14 the record with going through each so let me just
15 highlight a few.

16 As Your Honor is aware, in December of 2008
17 you'll notice under docket No. 1819, the state moved
18 for leave to serve rebuttal expert reports to rebut
19 opinions of three specific defense experts, Myoda,
20 Jarman, and Clay.

21 The reason why those specific experts were
22 identified is that there were -- I forget the exact
23 number -- over a dozen defense expert reports that had
24 been served by that date. So that pleading was
25 December 31st, 2008.

1 And just for the record, Drs. Bierman and
2 Connolly had not yet -- or their reports had not yet
3 been served which is why they were not included in
4 that pleading. Their reports were not served until
5 January of 2009.

6 But in that pleading, you'll notice I've
7 noted there at footnote 2 we explain that defendants
8 had additional expert reports that would be due in
9 January, and the state would potentially seek leave to
10 file one or more rebuttal expert reports in response
11 to them.

12 Let me skip ahead to where the court denied
13 the state's motion for leave to serve those rebuttal
14 expert reports, and that was at docket No. 1842, which
15 was issued, I believe, on January 29, 2009.

16 And there, Your Honor said that
17 rebuttal -- Your Honor denied the motion, but you
18 said, "Rebuttal expert testimony will be permitted at
19 trial to the extent that it constitutes true
20 rebuttal." And you'll say that language, Your Honor,
21 in bold and in italics on slide No. 2.

22 So fast-forward to April of 2009 under docket
23 No. 1989 which appears on slide No. 3. The court
24 there granted defendants' joint motion for
25 clarification of the court's January 29, 2009, orders.

1 There, Your Honor made a couple comments about
2 rebuttal, and I have highlighted the specific language
3 that I would draw your attention to on slide No. 3.

4 You commented, "Rebuttal denotes evidence
5 introduced by a plaintiff to meet new facts brought
6 out in his opponent's case in chief. At trial, it is
7 properly within the discretion of the trial judge to
8 limit rebuttal testimony to that which is precisely
9 directed to rebutting new matter or new theories
10 presented by the defendant's case-in-chief."

11 As there is some ambiguity as to what "true
12 rebuttal" means, there is ambiguity as to what "new
13 matter" means. So let me ask Gina to turn to slide
14 No. 14.

15 A couple courts have specifically addressed
16 what that word "new" really means in the context of
17 rebuttal. Let me draw your attention to the *Rodriguez*
18 *v. Olin Corporation*, 780 F.2d 491 at page 496, a Fifth
19 Circuit case from 1986. And there, the court said,
20 "New evidence for purposes of rebuttal does not mean
21 brand new. Rather, evidence is new if the evidence
22 was not fairly and adequately presented to the trier
23 of fact before the defendant's case in chief."

24 The court also said, "Rebuttal evidence is
25 designed to meet facts not raised before the

1 defendant's case in chief, not facts which could have
2 been raised. This rule proceeds from the view that a
3 plaintiff has the right to adduce whatever evidence is
4 necessary to establish its prima facie case and is
5 under no obligation to anticipate and negate in its
6 own case in chief any facts or theories that may be
7 raised on defense."

8 THE COURT: Which, as a practical
9 matter, might extend a plaintiff's case if that
10 obligation were imposed upon a plaintiff.

11 MS. MOLL: Agreed, Your Honor.

12 THE COURT: All right.

13 MS. MOLL: Let me further highlight for
14 the record the comments by the Sixth Circuit in the
15 *Benedict* case just for the record, *Benedict v. United*
16 *States*, 822 F.2d 1426 at page 1429, again a Sixth
17 Circuit case from 1987.

18 There, the Sixth Circuit said, "Although" --
19 and I've changed the language where you see the
20 bracketed language, Your Honor -- "Although the
21 defense evidence was not new since the
22 parties" -- sorry for the typo; it was late -- knew
23 "of its existence prior to trial, it was new for
24 rebuttal purposes. Evidence is new if, under all the
25 circumstances, the evidence was not fairly and

1 adequate presented to the trier of fact before the
2 defendant's case-in-chief."

3 And getting to the comment that Your Honor
4 just made, if I could ask Gina to kindly pull up slide
5 No. 7. Just going to the point that Your Honor made,
6 if a plaintiff was required to put in its own case in
7 chief everything that it might anticipate from
8 evidence from the defense, it surely would lengthen
9 the trial.

10 I highlight here on slide No. 7 several of
11 those defense experts that were disclosed who had
12 served expert reports who were deposed but who were
13 not called in the defendants' case. This list is not
14 exclusive but certainly there are many of them:
15 Drs. Churchill, Coale, Cummings, Horne, Jarman,
16 Merritt, Ginn, Davis, and there were others who were
17 not called.

18 So we've all been together for a long
19 time, and to have added into what was already a
20 lengthy case in chief admittedly would have only
21 further extended the trial and would have respectfully
22 been a waste of the parties' resources and that of the
23 court.

24 THE COURT: Well, particularly relevant
25 here in Jarman as to whom the state sought leave to

1 serve a rebuttal expert report.

2 All right. Go ahead.

3 MS. MOLL: As I mentioned earlier, the
4 state's motion for leave to serve rebuttal expert
5 reports at docket No. 1819 admittedly was limited to
6 those three reports. When the court ruled on that
7 motion and denied it and made the comments that it did
8 in its order, the state took that to heart and did not
9 think that pursuing leave to serve additional rebuttal
10 expert reports relating to other defense experts would
11 have been a prudent thing to do since we knew the
12 court's view on rebuttal at that time. So just so the
13 record is clear on that.

14 If I could move then into what occurred
15 during the case in chief. I've just gone through what
16 we knew by the time trial started in terms of the
17 court's view on rebuttal, at least the state's
18 understanding. Throughout the case in chief -- and I
19 don't think there's any dispute as to this -- the
20 state on many occasions -- and I can give you
21 examples, Your Honor -- was limited to the four
22 corners of the state's expert reports.

23 If you'll kindly turn to slide 5. I only
24 give these citations by way of example only; it's
25 certainly not a comprehensive list. But even in

1 defendants' own bench brief on the issue of the scope
2 of an expert's trial testimony vis-a-vis their report,
3 the defendants acknowledge -- and I'm citing from
4 docket No. 2712 -- the defendants stated to the court,
5 "This court should maintain the course it has followed
6 for the last year by limiting the state's experts'
7 trial testimony to the opinions and fair inferences
8 drawn from their timely Rule 26 disclosures, as
9 contemplated by Tenth Circuit precedent."

10 There are examples that the defendants
11 provided in their bench brief at pages 4 to 5 of that
12 pleading, where the state was limited to the four
13 corners of the expert report.

14 If Your Honor would kindly turn to slide 6,
15 I've listed here, just by way of example, where
16 defendants objected to certain questions posed by
17 Mr. Page of Dr. Fisher and where it was clear, based
18 on Your Honor's rulings as to those objections, that
19 the state would be limited to the scope of the
20 defendants' -- excuse me -- of the expert's report.

21 If Your Honor would indulge me, let me just
22 identify a few for the record. We've cited October 8,
23 2009, trial transcript at pages 1685, line 24, through
24 1686, line 3, and pages 1694 through 1699; also the
25 trial transcript from October 13, 2009, at pages 1707

1 through 1711, page 1772, page 1778, pages 1791, 1806,
2 1814 to 1815; October 14, 2009, trial transcript at
3 pages 1976, 2006 to 2007, 2058 to 59; and there are
4 others that I've identified there.

5 THE COURT: In attempting to maybe focus
6 in on the issue --

7 MS. MOLL: Yeah.

8 THE COURT: -- at hand, are there any of
9 these references that pertain to an attempt to delve
10 into the subject of what might be characterized as
11 rebuttal of a defense expert's position?

12 MS. MOLL: Well, I have to answer Your
13 Honor this way.

14 Dr. Fisher was the first state's expert to be
15 called, as you might recall even though it was months
16 ago, and he obviously was here for several days. And
17 based on the repeated objections by the defendants to
18 the state's attempt to perhaps go outside Dr. Fisher's
19 expert report and Your Honor's rulings, following
20 those rulings the state honored Your Honor's rulings
21 to the best of its ability and did the best it could
22 to limit further examination to those areas that were
23 expressly included within the scope of an expert
24 report.

25 THE COURT: But you're not seeking to

1 bring Fisher in to rebut other defendants' experts'
2 testimony?

3 MS. MOLL: That's correct. My only
4 point is that Fisher was the first to come along, and
5 once it was clear that throughout the course of the
6 trial objections to going outside the scope of the
7 expert report would be sustained, the lawyers
8 representing the state did the best they could to
9 honor Your Honor's ruling and try to avoid objections
10 as best we could even though we still certainly got
11 plenty of them. But certainly I think the record will
12 reflect that those types of objections were less
13 frequent later on because the state attempted to stick
14 within the four corners and expedite the proceedings.

15 So I understand your question, Your Honor. I
16 bring up Fisher because he came first, and that seemed
17 to set the precedent of the scope of proper direct
18 examination --

19 THE COURT: All right.

20 MS. MOLL: -- which we attempted to
21 adhere to the best we could.

22 As Your Honor is well aware, but just so the
23 record is clear -- Gina, if you could go to slide
24 No. 8 -- the court's admission of rebuttal testimony
25 is reviewed for an abuse of discretion. I've cited a

1 Tenth Circuit case there, *United States v. Kelley*, 187
2 Fed. Appx. 876 at 888, a Tenth Circuit case from 2006.
3 There, the court said, "A district court possesses
4 considerable discretion in governing the presentation
5 of evidence, and its decisions will not be disturbed
6 absent manifest injustice to the parties."

7 THE COURT: Finally some appellate
8 recognition of discretion.

9 MS. MOLL: Well, my point here, Your
10 Honor, is, you will be well within your discretion to
11 allow this rebuttal testimony.

12 I would be remiss if I didn't highlight
13 something that the Second Circuit said on this point
14 of discretion. "Such discretion should be tempered
15 greatly where the probative value of proffered
16 evidence is potentially high and where such evidence,
17 though admissible on the case in chief, was
18 unnecessary for the plaintiff to establish in its
19 prima facie case."

20 If you'll turn to slide No. 9, the Sixth
21 Circuit, in *Benedict v. United States*, 822 F.2d 1426,
22 at pages 1428 and 1429, a Sixth Circuit case from
23 1987. This is a case that has been cited approvingly
24 by the Tenth Circuit in the *Bell* case, 946 F.2d 1506
25 at page 1512.

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1 There, the Sixth Circuit set forth the
2 following standard, which is consistent with what I
3 have just stated to Your Honor, but which I think --
4 but they put it in very clear enters here. "In the
5 exercise of sound discretion, the district court may
6 limit the scope of rebuttal testimony to that which is
7 directed to rebut new evidence or new theories
8 proffered in the defendant's case-in-chief. However,
9 where the evidence is real rebuttal evidence, the fact
10 that it might have been offered in chief does not
11 preclude its admission in rebuttal. Furthermore, with
12 respect to real rebuttal evidence, the plaintiff has
13 no duty to anticipate or to negate a defense theory in
14 plaintiff's case-in-chief."

15 And then later on, page 1429, they said,
16 "However, insofar as the rebuttal expert's testimony
17 would have been directed to disproving the accuracy of
18 the defendant expert's methodology and data, it was
19 proper rebuttal and should have been allowed."

20 If you'll kindly turn, Your Honor, to slide
21 No. 9. I've identified a Tenth Circuit case which I
22 think is further illustrative of the point we're
23 trying to make here. This is *United States v. Posey*,
24 647 F.2d 1048, at page 1052, a Tenth Circuit case from
25 1981. If I could very quickly give Your Honor a

1 little background on that case. I think it is close
2 to on all fours.

3 *United States v. Posey* was a drug conspiracy
4 and distribution case. In the government's case in
5 chief, the government offered the testimony of an
6 expert named Laswell who testified that he performed
7 various tests and concluded that the substances sold
8 were L-cocaine, I guess an isomer of cocaine
9 prohibited by statute.

10 THE COURT: L-cocaine?

11 MS. MOLL: That's what it was called,
12 Your Honor. I have no idea what that is.

13 THE COURT: Nor I.

14 MS. MOLL: But in any event, that's how
15 they described it.

16 So the government in its case in chief had
17 expert testimony to prove that the type of cocaine
18 sold was the kind prohibited by statute.

19 During the defense case, the defendant
20 offered expert testimony from an expert named Shapiro
21 who testified as to two techniques that, I guess, are
22 available for distinguishing types of cocaine. He
23 testified that the best method was a test called the
24 polarimeter test, and he criticized the government
25 expert's tests as not conclusively making the

1 distinction between the two types of cocaine, I guess,
2 that were at issue.

3 During rebuttal, the government offered the
4 expert testimony of an expert named Stevenson which
5 corroborated Laswell's testimony from the government's
6 case in chief as to the existence of L-cocaine as a
7 substance tested and that corroborated that earlier
8 testimony.

9 On appeal, the -- and the defendant was
10 convicted. On appeal, the defendant argued that the
11 rebuttal expert's testimony was not in the nature of
12 rebuttal testimony and instead amounted to an improper
13 opening of the government's case in chief.

14 The Tenth Circuit case there stated on page
15 1052 of the case that I cited, and it referenced an
16 Eighth Circuit case, "In a case factually similar, the
17 Eight Circuit allowed the government to conduct
18 additional tests after concluding its case in chief
19 and to present the results as rebuttal evidence. The
20 court there found the new tests served the permissible
21 rebuttal function of counteracting the testimony of
22 the opposing expert witness."

23 And then it held on at page 1052, "We
24 conclude that the polarimeter tests were properly
25 characterized and admitted as rebuttal evidence."

1 And I've cited to the *Posey* case, Your Honor,
2 on slides 10 and 11 that you have before you.

3 If you would kindly, sir, turn to slide
4 No. 12. I've just quickly cited some other principles
5 from the Tenth Circuit and then the District of Kansas
6 which, I think, further illuminate this issue.

7 In *Tanberg v. Sholtis*, at 401 F.3d 1151, at
8 page 1166, a Tenth Circuit case from 2005, the court
9 said, "When a party opens the door to a topic, the
10 admission of rebuttal evidence on this topic becomes
11 permissible."

12 The Tenth Circuit in *United States v. Kelly*,
13 the citation I provided earlier, there the court said,
14 "Rebuttal evidence may be introduced to explain,
15 repel, contradict, or disprove an adversary's proof."

16 And then in the final case that I've cited on
17 slide 12, the *In re Cessna 208* case, 2009 U.S. Dist.
18 LEXIS 63185, at page 15, the District Court of Kansas
19 last summer held that "evidence that attacks the
20 defendants' experts' substantive testimony is proper
21 rebuttal."

22 Your Honor, I've also cited on slide 13 the
23 *Pitasi v. Stratton Corporation* case from the Second
24 Circuit. The citation is 96 F.2d 1558, at 1562.
25 There, the Second Circuit held that the trial court

1 abused its discretion in disallowing rebuttal
2 evidence. And if you'll indulge me just to read the
3 quote, Your Honor.

4 "The testimony that the plaintiff sought to
5 elicit was not necessary for its prima facie case.
6 Rather, it would have served the permissible rebuttal
7 function of impeaching defendant's witnesses, who had
8 testified during its case-in-chief that the side
9 entrances to this trail had never been closed. This
10 testimony plaintiff" -- I guess I have omitted some
11 language there, Your Honor. I apologize. "This
12 testimony was not collateral but central to the issue
13 of the defendant's negligence. Because this testimony
14 was highly relevant and material to impeach the
15 credibility of defendant's employees, we hold that the
16 district court erred in excluding it."

17 I apologize for the omission of language,
18 Your Honor. This is what happens when you're
19 preparing a PowerPoint late into the night.

20 THE COURT: I understand.

21 Now, in terms of the substance, I've taken a
22 look at the subject matter with regard to Dr. Engel.
23 I have not had time to go through and look at the
24 specific references, but I do have specific
25 recollection as to a number of those subject matters.

1 As to Dr. Wells, that proposed rebuttal
2 testimony is more limited. Is there anything about
3 the subject matter or the substance that you want to
4 touch on?

5 MS. MOLL: Your Honor, I would say if
6 you have specific questions about categories or if
7 there's a response necessary from any of the comments
8 that defense counsel will make, Mr. Page is ready to
9 address those.

10 I would simply note one thing in closing of
11 my own comments, and that is that as I started, we
12 have been very careful to limit what we are proposing
13 to the court as rebuttal testimony. We have taken the
14 charge seriously to be as efficient and narrowing as
15 possible as to that and we appreciate the court's
16 time. And I think I mentioned that we would
17 anticipate that it wouldn't take more than a day or a
18 day and a half.

19 I would just note for the record that when
20 Mr. Green stood before you on Monday morning and
21 raised the issue of rebuttal, he said -- and this is
22 from the transcript of January 11, 2010, at page 10434
23 at lines 2 to 7 -- "It was our contemplation that
24 rebuttal would be reasonably brief and to the point,
25 and we were banking on perhaps a day or day and a half

1 of rebuttal because we have some serious reservations
2 about whether there is room for a lot of rebuttal in
3 this case."

4 So our own estimation matches with that of
5 defense counsel and we have no interest in belaboring
6 the record. We have only an interest in providing
7 Your Honor with a very narrow scope of rebuttal
8 testimony that will further the pursuit of truth.

9 Thank you.

10 THE COURT: Thank you, Ms. Moll.
11 Mr. George.

12 MR. GEORGE: Thank you, Your Honor.

13 Good morning, Your Honor. You'll see that I
14 walked up to the podium with a collection of papers
15 that we, like Ms. Moll, had a late night last night.
16 A lot of different attorneys have provided me with
17 things that they think it's important for the court to
18 hear on the front end. I want to thank all of the
19 young lawyers who were awake into the wee hours
20 pouring over the transcript.

21 I walked in, Your Honor -- just anecdotally
22 here -- to what we call the war room at the Mayo Hotel
23 late, late last night and saw a flashback into the
24 earlier days of my career, attorneys in front of
25 computers with the record wide open pouring over and

1 highlighting and tabbing things. I promptly turned
2 around and went back to bed. But I do want to extend
3 my appreciation --

4 THE COURT: See what you all have to
5 look forward to.

6 MR. GEORGE: But, Your Honor, it
7 occurred to me as Ms. Moll was speaking that it's very
8 easy for us as attorneys to focus on the burden and
9 the long hours that we put in. And I do want to echo
10 Ms. Moll's comments that we're appreciative of the
11 time that the court has put in because I know Your
12 Honor, as well as your staff, have had many late
13 nights and have poured through the same information
14 that we have. We certainly don't take for granted the
15 time and effort that the court has put forward in this
16 case.

17 Ms. Moll's, of course, correct that this
18 trial, like all trials should be, is a search for the
19 truth and Your Honor has reminded us of that, as you
20 should, repeatedly throughout the trial.

21 THE COURT: Well, as an advocate, it's
22 easy to lose sight of that fact.

23 MR. GEORGE: Certainly.

24 THE COURT: I've been there and I
25 understand that.

1 MR. GEORGE: Certainly, Your Honor.

2 THE COURT: But ultimately -- you know,
3 this is simply the most recent battle in this area.
4 It's been to the United States Supreme Court already
5 in terms of point-source discharge. This will not be
6 the last battle. You all are preparing yourselves for
7 further battles that inevitably will be. So all of
8 this is not lost --

9 MR. GEORGE: Certainly, Your Honor.

10 THE COURT: -- this experience. Go
11 ahead.

12 MR. GEORGE: Thank you for those
13 remarks, Your Honor.

14 As with regard to the search for the truth,
15 as we all know, all trials must function within some
16 limitations. It's well-settled that the process of a
17 trial and the rules and procedures that are in place
18 require some limitations and they require the parties,
19 all of us on both sides of this courtroom, to
20 discharge certain responsibilities with respect to how
21 we present evidence and the process that is involved.
22 Those limitations and responsibilities were discussed,
23 of course, at various pretrial moments in this case in
24 terms of how this lawsuit would be structured.

25 On September 15th, as part of the pretrial in

1 this case, the court observed -- and I've heard this
2 from other judges in the past -- about the often
3 refrain that you get in these cases of attorneys
4 wanting to bring in new data and new analysis. And,
5 of course, Your Honor remarked that you always hear
6 that in these sort of cases, you know, why shouldn't I
7 be allowed to present scientific data that was created
8 last week.

9 Your Honor observed that the reason why we
10 can't have that sort of an open-ended process is we're
11 all working within the context of a lawsuit. In
12 lawsuits, there are deadlines and it's just part of
13 the process, that there are limitations that require
14 us to go about it in the way that we do.

15 Your Honor, of course, the state selected the
16 forum and the mechanism in terms of litigation in
17 which to pursue its rights in this case and these
18 rights come with certain responsibilities. One of
19 those responsibilities includes submitting the
20 evidence as part of their case that should have been
21 submitted, if they felt it was important, and limiting
22 any evidence that they may seek to admit as rebuttal
23 to things that truly are rebuttal.

24 With regard to the search for the truth, Your
25 Honor, I think the defendants' position is that the

1 record in this case is not small, 10,000 pages in
2 terms of just transcript that folks like Brian and
3 Terri have created through the course of this case,
4 hundreds of exhibits. There's no shortage of truth
5 and information within the record of this case.

6 The issue is really twofold, and that is, has
7 the ground that the plaintiff seek to cover already
8 been covered in the voluminous record in this case?
9 And we're prepared to show Your Honor with respect to
10 a lot of these points that is indeed -- that is indeed
11 the case. And then to the extent it hasn't been
12 covered, Your Honor, is it true rebuttal? And there
13 are some legal principles that define exactly what
14 true rebuttal is.

15 Ms. Moll did a more expansive search last
16 night of the case law than I did. I limited my search
17 to the Tenth Circuit. There is a case, which I'll
18 pass up in a moment, that I think is squarely on point
19 and lays out the appropriate legal principles from the
20 Tenth Circuit.

21 One of the cases I want to distinguish,
22 though, that Ms. Moll cited was an Eighth Circuit
23 case, I believe it was a criminal case involving these
24 tests. And as Your Honor knows, this is not a
25 criminal case. Criminal cases are different in terms

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1 of how they develop up until the point of trial. And,
2 you know, the amount of information that the
3 government gets about the defendant' case in pretrial
4 leading up to a criminal matter is fundamentally
5 different from the process that has occurred here,
6 where both sides have made full disclosures and both
7 sides have submitted voluminous expert reports leading
8 up to trial. And so, Your Honor, I'm not sure that
9 case is really applicable even if it were a Tenth
10 Circuit case.

11 THE COURT: Well, I'm constantly
12 reminded that these rules are flexible concepts that
13 have to be adapted for the specific trial that one is
14 dealing with. For instance, in a medical malpractice
15 case, where I've had numerous cases on the state side,
16 the expert issues are typically far more discreet and
17 they typically focus on causation.

18 In the arena where I learned the concept of
19 rebuttal and true rebuttal, typically the primary
20 battle was that between experts, and it was fully
21 known before the trial began what the relative
22 positions of the experts were.

23 So in terms of true rebuttal, a court could
24 be more limiting in that the other expert opinion
25 could be more fairly anticipated and reasonably known.

1 MR. GEORGE: Right.

2 THE COURT: Here, however, I think what
3 you really need to grapple with here is Ms. Moll's
4 point, which frankly has a compelling quality to it.
5 In a case such as this one, which is very rare, I've
6 had experienced lawyers stop me on the street who have
7 stuck their heads in the back of the courtroom, they
8 have never seen in their careers something like this.
9 The ones who have been around a long time remember one
10 case in this district that -- what was the old oil
11 case?

12 MR. TUCKER: Home-Stake, Your Honor.

13 THE COURT: Home-Stake Oil. That's the
14 one case that people remember that was kind of like
15 this.

16 But in a case like this, it seems to me that
17 one should not force the plaintiff to anticipate all
18 possible defense attacks relative to the plaintiff
19 expert testimony and there possibly should be greater
20 leeway given in terms of rebuttal. So I think that's
21 the central point here.

22 MR. GEORGE: I think it's a fair
23 observation, Your Honor. And we are prepared
24 to -- because I do think the fundamental issue is
25 reasonable notice and anticipation, whether the state

1 reasonably anticipated or should have reasonably
2 anticipated that the specific points that they seek to
3 rebut were going to be part of the defendants' case.
4 I think you framed the issue correctly. And certainly
5 in a case that has more experts, you know, that test
6 might look a little different in application.

7 So we are prepared to, when I conclude my
8 general remarks, to march through the topics that the
9 state has identified and point the court to instances
10 in the record which we think demonstrate that they not
11 only should have been aware, but that they were aware
12 of those topics. So we appreciate the test as you've
13 framed it and we believe we're prepared to meet it.

14 THE COURT: All right.

15 MR. GEORGE: Your Honor, with regard to
16 sort of the framework of the legal principles -- and I
17 don't think this is at all inconsistent with what Your
18 Honor just said -- I think the most instructive
19 case -- and I'll hand it up -- is *Koch v.* -- or *Koch*
20 -- I'm sorry -- *Koch v. Koch Industries* out of the
21 Tenth Circuit. And for the record, the citation is
22 203 F.3d 1202, a Tenth Circuit case from 2000.

23 I believe it lays out all of the relevant
24 legal principles that we need to wrestle with, and
25 I've pulled out three excerpts from that case and put

1 them on the slide that is on the screen.

2 But, of course, Ms. Moll is correct. She
3 cited, I think, a Seventh Circuit case, but there's
4 ample evidence in the Tenth Circuit that Your Honor
5 has broad discretion in terms of determining what is
6 rebuttal and what is not and whether to allow it.
7 There's no dispute, I think, between the parties that
8 Your Honor has discretion in this area.

9 The Tenth Circuit has defined rebuttal
10 evidence very similar to what we've seen from Your
11 Honor in pretrial rulings, and that is that it's
12 evidence that rebuts new evidence or theories that are
13 proffered in the defendants' case in chief. It's not
14 a bootstrap for the plaintiffs to go back and get a
15 do-over on their prima facie case. It must be
16 something that meets evidence that was presented in
17 the defendants' case and it must be evidence that was
18 not reasonably anticipated by the plaintiff.

19 There's two instances the Tenth Circuit has
20 recognized when the court is well within its
21 discretion to disallow rebuttal testimony. One we've
22 talked about quite a bit today, and that is if the
23 plaintiff reasonably could have anticipated the
24 defendants' evidence. We're going to wrestle with
25 that today as we go through these topics, Your Honor.

1 But the second one, Your Honor, I think is
2 also very relevant to this case, and that is when the
3 plaintiffs are warned that rebuttal evidence will be
4 restricted or limited in advance of trial. Obviously,
5 when they're on notice that there may be some
6 limitations on rebuttal, that counsel's in favor of
7 the plaintiffs putting on anything that they believe
8 is necessary -- reasonably necessary in their case in
9 chief.

10 So, Your Honor, we have some history with
11 rebuttal and Ms. Moll mentioned it. If we could turn
12 to the next slide. I won't repeat her description of
13 all of these motions. But, of course, there was a
14 motion for rebuttal expert reports in this case, and
15 it was a motion to rebut experts who are not now the
16 subject of their requests for rebuttal.

17 THE COURT: Right. But that's a
18 different procedural matter. To some extent, the
19 court was guided by Magistrate Judge Joyner's prior
20 written statement in an order that he wrote and I was
21 reluctant to differ from that position.

22 MR. GEORGE: I understand that, Your
23 Honor.

24 THE COURT: And primarily because I can
25 only imagine how much money was spent in pretrial

1 here. I don't know the number, I've often thought
2 about what that number must be, but I was loathe to
3 increase that number.

4 MR. JORGENSEN: Not enough for my firm,
5 Your Honor.

6 THE COURT: Mr. George may differ.

7 MR. GEORGE: I do, Your Honor. Your
8 Honor, as perhaps the only bill-payer in the
9 courtroom, I think I have unique perspective on this
10 whole question and I appreciate the court's
11 sensitivity to that.

12 I do acknowledge that a request to modify the
13 pretrial order for rebuttal expert reports is a little
14 bit of a different animal than --

15 THE COURT: It really is.

16 MR. GEORGE: But, Your Honor, there
17 is -- there is within those filings the seeds of
18 notice and some foreshadowing of the case to come.
19 Particularly relevant, Your Honor, is the state's own
20 statement as to how they intended to deal with
21 rebuttal at trial. Of course, Your Honor denied the
22 particular rebuttal report requests for these three
23 experts, but the state in justifying its request for
24 those three experts said that these are three that we
25 think need special treatment in terms of pretrial

1 disclosures. But you see at the bottom there, Your
2 Honor -- this is taken straight from their motion --
3 that with regard to all of the remaining defense
4 experts, "The state will rebut other aspects of the
5 defense case in its direct evidence, including expert
6 opinion, lay fact testimony, documents, or otherwise,
7 or in cross-examination."

8 And so clearly the state came into this trial
9 understanding that it had an obligation in its case to
10 reasonably anticipate for the other experts the areas
11 that they had criticized the state's experts and to
12 address that subject matter within the confines of its
13 own case.

14 Now, Ms. Moll is correct that Dr. Bierman and
15 Dr. Connolly's report, which are two of the reports --
16 or at least two of the witnesses that are at issue
17 here, were filed after Your Honor issued this order
18 and after this motion for rebuttal reports was filed.
19 But, of course, there was no subsequent motion and
20 so --

21 THE COURT: But given the court's order,
22 that was probably a reasonable position; correct?

23 MR. GEORGE: Well, Your Honor, we all
24 hate to test the patience of any court, but we also
25 understand our obligation to reserve our positions.

1 If we think we're entitled to something as counselors,
2 it's our obligation, even if we may be able to predict
3 a loss, to make that motion.

4 THE COURT: I've seen no reticence on
5 the part of either side here.

6 MR. GEORGE: Correct, Your Honor. But
7 being an advocate is sometimes a frustrating process
8 of butting your head against the wall but that's what
9 we do. That's part of our responsibility in this
10 process.

11 So if we could turn to the next slide, Your
12 Honor. Throughout the pretrial course of this case,
13 Your Honor has been called upon a couple of different
14 times to talk about rebuttal testimony, and in
15 particular rebuttal expert testimony, and I've put on
16 the screen a few things that I think are instructive
17 and that certainly factor into this question of
18 notice.

19 Your Honor, as I mentioned earlier, denied
20 the motion for rebuttal expert reports. The
21 defendants filed a motion for clarification because of
22 some language in that order that we were unsure of,
23 and Your Honor issued an order on that motion for
24 clarification which is found at docket 1989.

25 In that order, you provided the classic

1 definition of rebuttal, cited a Fifth Circuit case in
2 support of that, that "rebuttal denotes evidence
3 introduced by a plaintiff to meet new facts brought
4 out in his opponent's case in chief."

5 And then you went on to observe that it is,
6 of course, within your discretion to limit rebuttal
7 testimony to that which is precisely directed to
8 rebutting new matters or new theories presented by the
9 defendants' case in chief.

10 And then Your Honor in a footnote provided a
11 reflection, and I appreciated this when I read it and
12 again when I reread it last night, kind of going back
13 to the unique nature of this case and all of the work
14 that has gone into it leading up to pretrial.

15 Your Honor said, "This general rule" -- this
16 rule that if there's new facts or evidence presented,
17 it may entitle you to rebuttal -- "is unlikely to have
18 any application whatsoever in the context of expert
19 testimony at the trial of this case. The opinions and
20 theories of defendants' experts will have been fully
21 revealed to plaintiff through expert reports."

22 And, Your Honor, we're going to show you as
23 we go through these statements today that every one of
24 the points that they seek to rebut was fully and
25 completely revealed in our expert reports that they

1 had pretrial.

2 THE COURT: All right. Note that I
3 qualified it by saying "may be unlikely." And I will
4 freely admit that on May 21st, 2009, I had no idea as
5 to the volume of the expert testimony on either side
6 here.

7 MR. GEORGE: Understood, Your Honor.
8 And I'm not trying to constrain you by putting these
9 remarks up there. I'm just trying to explain how we
10 got to where we are. So I do appreciate your
11 comments.

12 You went on to say, "It is unlikely that any
13 attempt by the defendants' experts to opine as to some
14 as yet unrevealed theory or opinion will be
15 permitted."

16 I'll submit to you, Your Honor, that that
17 unlikelihood has come true in this case, the
18 defendants' case, and its expert opinions have very
19 closely tracked those reports. I don't believe that
20 any of the state's requests for rebuttal is based upon
21 some new previously undisclosed analysis. Maybe
22 they'll identify something as we go through these but
23 I will be surprised to find that.

24 Your Honor, then as we move one step closer
25 to trial on the eve of trial in the pretrial

1 conference -- if we could go -- we're there -- to the
2 next slide -- we discussed this issue of rebuttal
3 again. And the court reminded counsel on both sides
4 of what rebuttal is and what it's not, provided the
5 same definition that we've seen before, and once again
6 discussed its application in the context of experts.

7 And importantly, you put the state on notice,
8 Your Honor. In the transcript at page 60, lines 2
9 through 12, you advised the state that "to the extent
10 you anticipate an attack by the defendants with
11 reference to one of your experts or one of your
12 witnesses, it would seem to be best to address that."

13 And it could be addressed, you said, on
14 redirect or if you choose on direct, but true rebuttal
15 is such that could not be fairly anticipate.

16 And so, Your Honor, to suggest -- and I don't
17 think Ms. Moll is suggesting this -- that the parties
18 were not fully aware of the working definition of
19 rebuttal in this case and the need to anticipate what
20 attacks might come on their experts as through the
21 course of this trial I think simply does
22 notwithstanding scrutiny when you look at the record.

23 The next to the last slide, Your Honor, that
24 I want to walk through with Your Honor is there have
25 been a couple of exchanges throughout this trial with

1 regard to whether or not -- whether the state has
2 somehow been denied an opportunity in their case to
3 comment on the defendants' experts.

4 I sensed in Mr. Bullock's remarks yesterday
5 that that was part of the basis for a request for
6 rebuttal. I did not hear that today explicitly from
7 Ms. Moll. But, Your Honor, we searched the transcript
8 last night to see if we could find any instance where
9 the state have been denied an opportunity in its case
10 to comment on one of the defense experts and we found
11 no such opportunity.

12 We found two exchanges. There was one
13 exchange Mr. Page and the court, and it's found at the
14 transcript page 2473, with regard to Dr. Fisher. This
15 was where you'll recall -- or maybe you won't recall,
16 Your Honor -- that at the end of Dr. Fisher's
17 examination, Mr. Page stood up and said that there was
18 a matter that was raised in opening that he believed
19 he would be entitled to present evidence on, that he
20 thought was new and outside the bounds of our expert's
21 report, and that Dr. Fisher had done some analysis, a
22 new analysis, and prepared to rebut that.

23 Your Honor, I think, correctly counseled
24 Mr. Page that we should wait and see whether the
25 defendants try to present new analysis before you

1 present any new analysis. And so as a result of that,
2 Mr. Page elected not to proceed with Dr. Fisher.

3 But what's important to note here, Your
4 Honor, on this exchange is Dr. Fisher's not one of the
5 rebuttal witnesses that the state is seeking to put
6 on. The new analysis that they were concerned about
7 did not come in as part of the defendants' case and so
8 that exchange really is not justification for
9 rebuttal.

10 The only other reference in the transcript
11 that seemed on point that we could find in our search
12 last night, Your Honor, occurred during the
13 examination of Dr. Connolly. There was an objection
14 made during the direct of -- direct examination of
15 Dr. Connolly as to whether something was in his report
16 or -- I'm sorry. Mr. Green asked Dr. Connolly to
17 comment on a statement that had been made by one of
18 the other experts in this case.

19 There was an exchange again between Mr. Page
20 and the court as to whether the court had denied the
21 plaintiffs the same opportunity, to comment on some
22 opinion or report by an expert. And Your Honor said
23 that -- just to paraphrase -- that you didn't believe
24 you made -- you denied them any such right, and if
25 Mr. Page could refer you to something, then he might

1 have an opportunity to bring them back in rebuttal.

2 This was the issue that we discussed a little
3 bit yesterday, Your Honor, whether or not the
4 defendants through objections somehow denied the state
5 the ability to present rebuttal evidence in their case
6 in chief. I have found no such instance in the record
7 of this case.

8 Ms. Moll -- can we pull up slide 6 of
9 Ms. Moll's presentation? Is that possible?

10 MR. BULLOCK: We can do that.

11 MR. GEORGE: Can you all do that?

12 *(Discussion held off the record)*

13 MR. GEORGE: Well, Ms. Moll, do you have
14 a copy of your PowerPoint?

15 MS. MOLL: The judge has one.

16 *(Discussion held off the record)*

17 MR. GEORGE: I'm sorry, Your Honor.

18 So, Your Honor, I believe these are instances
19 on slide 6 where Ms. Moll or the state believes that
20 the court or the defendants have somehow prevented
21 them from offering testimony that could be arguably
22 described as rebuttal testimony.

23 I have two observations, Your Honor. The
24 first five of those examples all relate to Dr. Fisher.
25 Of course, Dr. Fisher is not one of the experts

1 they're seeking to bring in rebuttal so I'm not going
2 to get into a line-by-line discussion of those.

3 But the last one on here -- and I think this
4 is interesting, Your Honor -- is with respect to
5 Dr. Engel. I had someone pull the transcript so I
6 could see what happened there because Dr. Engel is one
7 of the experts they want to bring. They've cited the
8 transcript page 6278 through 6279.

9 And, Your Honor, when you look at that
10 transcript, what happened was Dr. Engel -- there was
11 an attempt to elicit an opinion from Dr. Engel that I
12 believe was outside his expert report. I actually
13 made the objection, Your Honor, objected that it was
14 outside his expert report, and therefore, was new
15 opinion. Your Honor, after an exchange between
16 counsel, overruled my objection.

17 As much as that hurts me to say, it proves
18 the point, Your Honor, and that is that certainly that
19 ruling is no basis or grounds for now bringing
20 Dr. Engel back to testify to something he's already
21 testified to.

22 So, Your Honor, where does this leave us in
23 terms of how we march through this? I do think we
24 have to take these statements one by one, and the
25 defendants are prepared to do so and I suspect the

1 state is as well.

2 But I think if we look at the last slide --
3 are we back and running? Can we go to the last slide?
4 I think there are really -- there are two potential
5 avenues for rebuttal testimony here.

6 No. 1, rebuttal to a specific statement
7 elicited by the defendants from a defense witness is
8 fair grounds for rebuttal if it's demonstrated to have
9 been new analysis that could not have been fairly
10 anticipated.

11 No. 2, if there is an instance where the
12 court, by virtue of ruling on an objection,
13 specifically prohibited the state from eliciting an
14 anticipatory response from a state witness to an
15 anticipated defense criticism, that would be potential
16 grounds for rebuttal testimony.

17 Your Honor, I think as we move through these,
18 we need to keep those two categories in mind as we
19 evaluate the testimony in the record that supports the
20 claim for rebuttal.

21 So, Your Honor, that's really all I have in
22 terms of opening remarks. Since the state has
23 identified the specific things that they believe
24 they're entitled to rebut, I think an efficient way to
25 proceed would be for the defendants to respond to

1 those. We haven't made a filing obviously, but we've
2 looked at their citations and prepared some
3 information.

4 And as Your Honor can tell from the
5 disclosure that was made last night, there's more
6 ground to traverse with Dr. Engel than there is with
7 some of the other experts. There's one item, I think,
8 that relates to Dr. Connolly. The purported rebuttal
9 of Dr. Connolly is the only item. And I think just so
10 we could feel good about making some progress early,
11 maybe we should start there and then move to Dr. Wells
12 and then Dr. Engel.

13 THE COURT: Well, particularly since on
14 your frame 6, you reference Dr. Connolly -- I haven't
15 obviously had time because I was just presented with
16 this -- does your reference here to the transcript
17 dovetail with the rebuttal testimony proposed by the
18 plaintiffs with reference to Dr. Connolly?

19 MR. GEORGE: Let me -- Mr. Jorgensen is
20 our spokesman on Dr. Connolly. He can probably answer
21 the court's question better than I. So can I yield to
22 him on that point?

23 THE COURT: Please.

24 MR. JORGENSEN: The answer is no, Your
25 Honor. What's on the screen there is just bringing to

1 the court's remembrance the standard that the court,
2 which I think is the right standard, set out, which is
3 to say to Mr. Page, if you can point me to an instance
4 where I denied you an opportunity to get into
5 something on direct, well then I'm going to give you a
6 chance on rebuttal.

7 THE COURT: I understand that. But I
8 just wondered whether the subject matter of the
9 dialogue with Mr. Page tied in with the subject matter
10 of that which the --

11 MR. JORGENSEN: No, it does not, Your
12 Honor.

13 THE COURT: -- plaintiff wishes to
14 present rebuttal. All right.

15 MR. JORGENSEN: No, sir.

16 THE COURT: Since it doesn't then, let's
17 deal with the -- let's deal with the substance of the
18 proposed rebuttal.

19 MR. JORGENSEN: Yes, Your Honor.

20 THE COURT: With all due respect, I
21 think given the nature of this sort of case, the two
22 alternative grounds for rebuttal presented by
23 Mr. George, although frankly consistent with the
24 court's view of rebuttal coming in, with all due
25 respect, I think the court needs to be more flexible

1 given the nature of this case. Because obviously if
2 one were to be too rigid in the application of that
3 view, in a case such as this, a four-month case would
4 become a six-month case very easily.

5 MR. JORGENSEN: That's understood, Your
6 Honor. And I'm going to take that to heart as I make
7 my presentation very briefly here today.

8 THE COURT: Please.

9 MR. JORGENSEN: Let me begin by saying,
10 I have a plane ticket to see my wife and kids today.
11 So if I seem overly bubbly it's because nothing can
12 suppress my joy at this moment. So --

13 THE COURT: Well, in chambers, we've
14 talked about that. On both sides, this has been a
15 sacrifice for all of you in that regard and I very
16 much appreciate it.

17 MR. JORGENSEN: What a privilege, Your
18 Honor. It's been one of the highlights of my career
19 to be here.

20 So the testimony that is offered -- or
21 proposed to be offered from Dr. Connolly is -- and I
22 quote now from the pleading that plaintiffs put
23 together last night -- the only important source of
24 soluble-reactive phosphorus in base flow is from
25 wastewater-treatment plants.

1 That's what they want to get to. I'm not
2 sure that's exactly what Dr. Connolly said, Your
3 Honor, but I think we all understand the point. The
4 point is, Dr. Connolly sat on the stand and said,
5 wastewater-treatment plants are controlling the algae
6 problem, to the extent there is a problem, in this
7 watershed with some exceptions, in slow-flowing areas
8 like the riverine section, or little side areas where
9 the conditions are either stagnant or inherently local
10 next to a golf course, next to a cattle field.

11 With those exceptions, the driving factor,
12 the controlling factor, of phosphorus for water
13 quality in the river and the lake is
14 wastewater-treatment plants and --

15 THE COURT: Well now, in that regard --
16 and I think we all need to focus on this, particularly
17 in the context of findings of fact and conclusions of
18 law -- what you say is an important topic here.

19 If you'll note -- and I'm sure you haven't
20 lost this -- Mr. Bullock has now focused in a little
21 bit more closely in terms of the plaintiff's position
22 with regard to its burden of proof. If you've noticed
23 over the last few days, he has focused -- and I think
24 properly so -- that the plaintiff's burden is not to
25 show that the land application of poultry litter is

1 the primary source of phosphorus, but rather that it
2 is a significant source.

3 MR. JORGENSEN: Indeed, Your Honor.
4 That's true.

5 THE COURT: And once again -- and I
6 understand the defendants wish to focus on and try to
7 suggest that the plaintiff's burden is to prove that
8 it is the primary source. It is not.

9 MR. JORGENSEN: I understand that
10 position, Your Honor. And I believe the testimony of
11 Dr. Connolly establishes that wastewater-treatment
12 plants are the controlling factor.

13 So we're on the same page as to what they
14 want to come in and talk about. The question is, is
15 it true rebuttal, as you've said. And now I'll move
16 quickly into that.

17 The subject of whether or not
18 wastewater-treatment plants were the controlling
19 factor, whether they were the problem and are the
20 problem in this system was the subject of discovery
21 and fighting from the very first. And as a result,
22 all the parties knew that this was going to be an
23 issue, and as a result it appeared over and over again
24 in discovery disputes, in expert reports on both
25 sides.

1 I'd like to hand out -- I'm not going to give
2 every example or we'd be here all day and I want to
3 move quickly but let me give some examples.

4 May I?

5 THE COURT: Yes.

6 MR. JORGENSEN: This is just an example.
7 This is the table of contents, just the table of
8 contents, of Dr. Connolly's report. You'll see on the
9 first page he says, one of his major headings, "There
10 are many contributors of phosphorus to the Illinois
11 River and Lake Tenkiller." That's your point you just
12 made, Your Honor.

13 But then down on 2.9, "Wastewater-treatment
14 plants appear to be the most important source of
15 bioavailable phosphorus to the system." And then at
16 2.10, "Lake sediment phosphorus is a minor source of
17 bioavailable phosphorus."

18 It's not a small issue in his report. On the
19 next page at section 4.2, his table of contents says
20 that he's going to talk about "much of Lake Tenkiller
21 does not see the phosphorus that enters from upstream
22 because it plunges to the lake bottom waters." And at
23 4.3, "Reductions in phosphorus load will only impact
24 the chlorophyll-a levels in the riverine section of
25 the lake" because of that plunging.

1 And then not yet done, talking about at
2 length -- I mean, this expert report's enormously
3 long -- talking about the importance of
4 wastewater-treatment plants, at Section 7.2, he says,
5 "The improving water quality is evidence that poultry
6 litter application is not a dominant cause of water
7 quality impairment, water quality is improving despite
8 increase in poultry population, water quality
9 improvements correlate with changes in
10 (wastewater-treatment plant) loadings."

11 Now, I've only given you the table of
12 contents, but you heard Dr. Connolly's testimony from
13 the stand and you know that it amplified on that and
14 talked about all the text that was in the report.

15 But now the question is, is Dr. Connolly's
16 report the only time that the idea came up that it
17 might be wastewater-treatment plants that are the
18 problem in this system? And let me remind Your Honor,
19 because we've had so many proceedings, of a key
20 proceeding.

21 On September 4th, 2009 -- may I?

22 THE COURT: Yes.

23 MR. JORGENSEN: On September 4th of this
24 year, we had a hearing here in this court, and the
25 hearing was on the subject of a pretrial motion, a

1 motion in limine. Let me just lay the groundwork
2 because, I think, then we can move a lot more quickly.

3 Because the parties had fought in discovery
4 so much over is it wastewater-treatment plants or is
5 it not wastewater-treatment plants, the plaintiffs
6 knew that this was coming, this defense.

7 So in Dr. Engel's report, Dr. Engel had a
8 section -- now, recall the sequence in which reports
9 roll in. Dr. Engel's report rolls in first. There's
10 a section in Dr. Engel's report that says, and even if
11 it is wastewater-treatment plants that are the
12 problem, these defendants have processing facilities
13 and so they're responsible for the
14 wastewater-treatment plants too.

15 Then we file the motion in limine saying,
16 okay, that's not in the complaint, that's preempted by
17 the Clean Water Act, and they have NPDES permits for
18 wastewater-treatment discharges, we cannot be held
19 responsible for the wastewater-treatment plants.

20 But obviously the plaintiffs knew this was
21 our defense, and this is our motion in limine to
22 say -- which the court granted saying, you haven't
23 sued based on point-source discharges and so there
24 will be no evidence presented to the court that we are
25 responsible for wastewater-treatment plant discharges

1 too. But it's just a great example that they knew of
2 our defense.

3 We went on, I'm afraid too long, taking up
4 your time on September 4th. So I have only picked out
5 just a few pages of the pages and pages of this
6 discussion. But let me give a sample of what we
7 talked about.

8 This is on page 287 of the transcript from
9 the pretrial conference on September 4th, 2009, and
10 this is me talking. And I said to the court, "So what
11 we're going to be saying is the elements that would
12 cause the pollution here, that would cause algae to
13 grow is the type of phosphorus that algae can eat.
14 And that comes from the wastewater-treatment plants,
15 it comes directly into the water. There is no fate
16 and transport. There is no getting caught up in the
17 land. There is no how does it ever get there with the
18 miles ahead? It goes straight into the water. It's
19 the type of (phosphorus) that algae can eat." It
20 actually says "it's the type of water" here but it
21 means phosphorus.

22 "That's what is creating a quantity which are
23 or will likely create a nuisance. In contrast, we
24 have a type of phosphorus that does not grow algae or
25 at least -- I need to be more precise. Poultry litter

1 contains both kinds and you've made that point."

2 And that's because you, I, and Mr. Page
3 already had the discussion about soluble-reactive
4 versus not soluble-reactive and wastewater-treatment
5 plants.

6 "But we will be making the point of the
7 relative differences. This one is more likely to grow
8 algae, more easily grows algae and is close, I mean
9 directly deposited. We," meaning the defendants, "are
10 less likely to grow algae and are far away. So the
11 jury, when you are trying to decide what's in the
12 water, where did it come from, was it put in by us and
13 was it put in by us in a quantity which are -- which
14 is or is likely to create a nuisance? It's
15 wastewater-treatment plants."

16 A little farther down I say, Whether or not
17 wastewater-treatment plants are the cause is a fair
18 question. "We're going to say they have evidence
19 which Mr. Page has alluded to" -- because we talked at
20 length about the evidence that the plaintiffs said
21 they that wastewater-treatment plants were not the
22 problem -- "we're going to say they have evidence
23 which Mr. Page has alluded to which is going to be
24 perfectly legitimate to come in and say it's not the
25 cause, and we will say it is the cause, and that will

1 be the fight."

2 So if there's any suggestion that at any
3 point before trial or during trial we said, Your
4 Honor, do not let the plaintiffs say that
5 wastewater-treatment plants are not the cause, that's
6 just not true. We said right from the first, they
7 have evidence or have tried to develop evidence,
8 they're going to say, it they can say it.

9 And then the court said, "First of all, why
10 wouldn't the limitation instruction be sufficient?"
11 This is when we still had a jury. "I mean you're
12 going to say because of the definition of pollution
13 that you're going to raise these other possible causes
14 of algae and I understand your position, but if you're
15 going to do that couldn't the prejudice you contend
16 you're going to suffer be eliminated or at least
17 greatly eliminated or at least greatly lessened by a
18 limiting instruction?"

19 I say, "It could be. It could be greatly
20 lessened, I think, by a limiting instruction, but I
21 just want to suggest that if I'm a juror and I hear
22 wastewater-treatment plants are the cause, and I hear
23 wastewater-treatment plants from the state are not the
24 cause and then I hear, but no matter what, these
25 people are responsible for the wastewater-treatment

1 plants, it's hard for me not to take that for any
2 purpose. I mean your instruction would have to be
3 essentially you can't consider that for any purpose."

4 And then here's the basis of your ultimate
5 ruling, Your Honor. You said, "I guess your response
6 would be, Judge, they don't need to know who the
7 source is because that's not what's being sued on."

8 And I say, "Exactly. They," meaning the
9 jury, "can know it's wastewater-treatment plants and
10 there's going to be tons of evidence from the
11 plaintiffs about wastewater-treatment plants are not
12 the cause, poultry litter is the cause. And we're
13 going (to) say, no, poultry litter is not the cause,
14 wastewater-treatment plants are the cause," and we go
15 on.

16 And then you say, "Well, just an observation.
17 You're going to have folks on this jury who are going
18 to be somewhat familiar, I imagine, with the Illinois
19 River. And given that at least it appears, not
20 knowing the entire watershed, that algae is freely
21 growing in areas above where there are no
22 wastewater-treatment plants, I suppose some folks are
23 going to have a hard time believing that defense."

24 And then I say, "That might be true, Your
25 Honor, and if that's the case we might pay for our own

1 defense, but that doesn't make it permissible for the
2 plaintiffs to say" essentially that we are the cause
3 of the wastewater-treatment plants as well to try to
4 blame us.

5 Then Mr. Page stands up and says, "Just
6 briefly, Your Honor. The court seemed to be
7 interested in when was this information presented to
8 the defendants," this information being Dr. Engel's
9 contention that the defendants are responsible for the
10 wastewater-treatment plants as well as nonpoint-source
11 pollution. And he says, and "this evidence was
12 presented to the defendants as part of our case and it
13 was part of Dr. Engel's expert report."

14 If I can go to page 291, the court says, "The
15 question is why, if that's not being sued upon?" He's
16 talking to Mr. Page. "I mean, it seems to me that to
17 the extent that they are going to try to argue to a
18 jury that algae is caused primarily by
19 wastewater-treatment plants, you guys are going to
20 knock them over the head because, you know, my limited
21 knowledge of the IRW is such that algae is, as I said
22 to Mr. Jorgensen, algae is growing pretty fast in
23 areas where there aren't wastewater-treatment plants
24 upstream. So, now whether that's as a result of
25 septic tanks, whether it's" --

1 THE COURT: Let me just say to clarify,
2 the trial has since informed me that with regard to
3 Flint Creek, there is a wastewater-treatment plant
4 above --

5 MR. JORGENSEN: Indeed.

6 THE COURT: -- of which I was
7 unknowledgeable at the time I made that statement --

8 MR. JORGENSEN: Indeed.

9 THE COURT: -- because of the Siloam
10 Springs plant dumping into Sager Creek.

11 MR. JORGENSEN: Exactly.

12 THE COURT: So my understanding frankly
13 at that time was erroneous.

14 MR. JORGENSEN: Exactly. And I'm in no
15 way criticizing the court. That's the function of
16 trials, both sides learn, the court learns, and that's
17 exactly what happened here.

18 THE COURT: Learn more about the
19 truth.

20 MR. JORGENSEN: Indeed we get to the
21 truth.

22 And then Mr. Page ends by saying that we're
23 going to argue about muskrats and squirrels, and
24 that's where it ends.

25 So my point is just this, Your Honor. I

1 think Mr. George and Ms. Moll have done a nice job of
2 articulating various stands and offering them to the
3 court. But with Dr. Connolly it's easy. Under no
4 standard could the suggestion be made that having
5 stood at the podium and made fun of my defense,
6 Mr. Page can now say I wasn't aware that that defense
7 was going to come.

8 What has happened is, Dr. Connolly has sat on
9 the stand and presented what is the most compelling
10 scientific evidence in this case. But the standard is
11 not, oh, that was really good evidence and now I would
12 like to have a rebuttal.

13 THE COURT: I think what he was making
14 fun of were your cartoon muskrats and birds from the
15 preliminary injunction hearing.

16 MR. JORGENSEN: Indeed, Your Honor. I
17 thought about bringing that back but then I thought
18 I'd be pushing my luck.

19 THE COURT: Thank you.

20 MR. JORGENSEN: Your Honor, I have the
21 deposition of Dr. Connolly where his testimony -- I
22 have it right here -- where his testimony was
23 discussed at length. You may recall the map of the
24 red squares and the blue diamonds and the green dots
25 for what's upstream of a wastewater-treatment plant,

1 what's down.

2 I could show you the plaintiffs went on for
3 hours, if not a day, with him on this topic. It's not
4 true rebuttal. I won't burden the court by submitting
5 it unless plaintiffs deny that they had that
6 opportunity in their deposition.

7 THE COURT: All right. Thank you.
8 Well, we've picked an important issue to start off
9 with.

10 So Ms. Moll -- or Mr. Page. I'm sorry. It
11 should be Mr. Page's response?

12 MS. MOLL: Can we tag team this one,
13 Your Honor?

14 THE COURT: Absolutely. Go ahead.

15 MS. MOLL: Thank you, Judge. I'd like
16 to first comment, if I could, in response to
17 Mr. George's statements. I'll paint with a
18 broadbrush, if I could.

19 I'm sitting here and I'm thinking to myself,
20 I must not be smart enough to understand how we've
21 gotten to this point. Because as I hear the
22 defendants' position distilled, it is that in our case
23 in chief we had to put on all of our voluminous
24 evidence to prove all of our claims, then have our
25 experts explain what the defense experts said in their

1 voluminous expert reports and depositions, and then
2 tell Your Honor why they're wrong.

3 THE COURT: Right.

4 MS. MOLL: We would be a third of the
5 way in our case in chief right now.

6 THE COURT: Right.

7 MS. MOLL: And as much as we've all
8 learned from this case, I don't think we, you know,
9 want to be here in the fall of 2010.

10 So I don't understand -- and forgive me,
11 Judge. I'm emotional about this one for some reason
12 but we've been here for a long time. I don't
13 understand the argument that our experts had to sit on
14 that stand and identify all of the defense experts,
15 who critiqued them in reports, had to go on and
16 explain why they were wrong in our case in chief.

17 That is all we are trying to do by way of the
18 proposed rebuttal testimony from Drs. Engel and Wells.
19 We are not seeking to put on testimony that somehow
20 bolsters testimony in our case in chief. We are going
21 to hopefully put on rebuttal testimony that would
22 directly critique the substantive testimony of
23 Drs. Bierman and Connolly.

24 THE COURT: All right. But just to make
25 clear, we're not attempting to put on any new

1 opinions, but rather to respond to their critique;
2 correct?

3 MS. MOLL: That's correct.

4 THE COURT: All right. Could counsel
5 approach?

6 *(Bench conference held at sidebar)*

7 THE COURT: Unless anybody really wants
8 to spend a whole lot of time arguing about this, I
9 think I'm ready to make a decision on this. Anybody
10 have any serious objection?

11 My inclination is to allow it. You know,
12 we've been here too long to cut the plaintiff short
13 with respect to this. I'm basically guided by the
14 flexibility allowed to a trial court in allowing
15 rebuttal, particularly in a long case like this where
16 I don't believe that I should strictly hold the
17 plaintiff to the standard that I would have held the
18 plaintiff to in, as I explained, a medical malpractice
19 case in state court.

20 I'm inclined to allow it frankly as long as
21 it's not new.

22 MR. JORGENSEN: May I just say one thing
23 Your Honor? And then I'll defer to Mr. George to fill
24 this out.

25 In that regard, as to Dr. Engel, it's my

1 understanding that the materials we've been given show
2 new analysis, a new run of the data, and so that might
3 be a slightly different camp. Because we would need
4 to get it, analyze it over the next week, or otherwise
5 we'd be in trouble.

6 THE COURT: Well, I don't know about new
7 runs.

8 MR PAGE: May I speak, Your Honor?

9 MS. MOLL: Yes. Mr. Page.

10 MR PAGE: What Dr. Engel has done -- and
11 we've given the information in our disclosures to the
12 defendants, they have it -- is he's taken
13 Dr. Bierman's runs that he testified to, the S & Ps,
14 and the reverse days and the 345-fold point-source
15 additions and the 14-fold nonpoint-sources additions,
16 those four sensitivity tests, and run them not through
17 Dr. Bierman's model, his so-called recalibrated model,
18 but through Engel's routing model to show the
19 differences.

20 I've tried to elicit that testimony on cross
21 and the objection was there wasn't a foundation
22 because there was no witness here to testify as to how
23 those runs occurred.

24 THE COURT: Well, but my understanding
25 -- and granted it's limited -- but my understanding

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1 was the basic criticism was that the coefficients were
2 so flexible, it allowed everything to adjust to reach
3 the results that were seen at the three locations
4 downstream. If one runs those numbers through Engel's
5 model, it doesn't adjust the coefficients to be able
6 to reach those results downstream. So that's a
7 meaningless exercise; right?

8 MR PAGE: No, sir. And the exact point
9 is the premise that you've taken away, that the
10 coefficients are flexible.

11 There are misrepresentations by Dr. Bierman
12 that the coefficients are flexible. He even stated
13 that the coefficients were not found in the expert
14 report and those topics will be the beginning. The
15 topics will begin that the coefficients are not
16 flexible, that they are the essential part of the
17 model, and then if you run them with the proper
18 coefficients, you have the -- the model always get the
19 same results.

20 THE COURT: All right. Well, this is a
21 central issue, because frankly the defendants beat
22 Engel up pretty badly in the defendants' case in
23 chief. And if you can prove that those coefficients
24 aren't flexible basically to give the result that you
25 want, then that's an important point for the plaintiff

1 to make.

2 MR. GEORGE: Your Honor, may I be heard
3 briefly?

4 THE COURT: Yes.

5 MR. GEORGE: And I think your
6 understanding of the way the model works is correct,
7 and if we need to explore that further in rebuttal we
8 will.

9 But with respect to the disclosure issue,
10 which is a different animal, Mr. Page has provided in
11 the demonstratives a slide that shows a graph of the
12 output of the new runs that Dr. Engel has performed.
13 But as Your Honor heard at length with both Bierman
14 and Engel, these models every time you run them, they
15 create a ream of data with spreadsheets and files.
16 There's been no -- and those files had have to be
17 evaluated by an expert, pulled apart to determine what
18 actually is happening within the model.

19 There's been no disclosure of the new model
20 runs and those associated files that would allow the
21 defendants to prepare a cross-examination.

22 MR PAGE: Your Honor, may I be heard?

23 I think that's a gross hyperbole of what has
24 to happen here. Dr. Engel took exactly what
25 Dr. Bierman did, working from his report --

1 THE COURT: But even if it is,
2 Mr. Page -- I'm sorry to interrupt -- but even if it
3 is, Dr. Bierman ought then to be given an opportunity
4 to look at that which Dr. Engel ran to be able to
5 prepare Mr. George for cross-examination; right?

6 MR PAGE: That's true. I mean, I don't
7 have a problem with that, Your Honor. I think it's
8 very simple. The routing model -- he
9 knows -- Dr. Bierman knows what the routing model is.
10 He has the coefficients. They're part of the
11 demonstratives. They were part of the expert report.
12 He knows what his own variables are. He can
13 plug -- he knows those are his hypotheticals. Those
14 are his inputs. He can put that in the same routing
15 model and run it. It takes a day to run it.

16 If the defendants wants the output files,
17 we'll get them to them in a couple of days. I mean,
18 Mr. Engel has run it and we can give them those output
19 files.

20 But, again, Your Honor, it's not a complex
21 matter. It's a matter of just Dr. Bierman running the
22 model, which he clearly said he can do, with the
23 original coefficients that Dr. Engel used and
24 Dr. Bierman's inputs. It takes a day to run each
25 scenario.

1 THE COURT: Except that that's, as I
2 understand it -- and I can be corrected
3 obviously -- but my understanding is that that was
4 Bierman's point, is that the coefficients change
5 depending on what inputs you place into it.

6 MR. PAGE: And that's wrong. That a
7 misrepresentation. That's exactly what the
8 rebuttal --

9 THE COURT: All right. I'm going to
10 give you the opportunity then to correct that
11 misimpression but it has to be fair for the defense.

12 And your suggestion, Mr. George?

13 MR. GEORGE: Yes, Your Honor. Certainly
14 if the court's inclined to allow some rebuttal
15 testimony on this point, Dr. Engel, who's familiar
16 with his model, can come in and speak to the question
17 of whether these coefficients are allowed to float or
18 whether they are -- they are fixed. He can provide
19 the court with that explanation without a whole new
20 analysis of modeling runs and files that frankly the
21 defendants will not have an opportunity to be prepared
22 to cross-examine on. I think that's the basic point.

23 It doesn't require the running of the model
24 again in another alternative scenario with a
25 production of voluminous records for the parties to

1 review.

2 MR. PAGE: And the reason it does, Your
3 Honor, why I disagree with Mr. George, is that the
4 other testimony of Mr. Bierman is no matter what
5 inputs you put in, you get the same results. And then
6 he shows --

7 THE COURT: Right. Because the
8 coefficients change.

9 MR. PAGE: The coefficients change.

10 THE COURT: Right.

11 MR PAGE: And the point is is those are
12 real coefficients. Those coefficients are
13 essential and they don't change with Engel's model --

14 THE COURT: Okay. But let's move from
15 the substance and try to figure out how we can fairly
16 allow you to do this because I'm going to allow you to
17 do it, all right? But then what do we have to do
18 procedurally to be fair to the defendants? What do
19 the defendants need to have if we -- if we start up
20 again two Mondays from now -- because next Monday is
21 Martin Luther King, and as I say, I've got my criminal
22 trial which is expected to last into Thursday -- if we
23 start up the following Monday, is that going to be
24 enough time for the defendants to prepare for the
25 cross-examination on your rebuttal?

1 MR PAGE: Well, Your Honor, Dr. Engel,
2 it took him -- he has four computers and it took him
3 one day to make this output.

4 THE COURT: Well, you need to provide it
5 obviously.

6 MR. PAGE: So I can him that output on
7 Monday, give that to the defendants on Monday.
8 They'll have two weeks --

9 THE COURT: One week.

10 MR. GEORGE: One week.

11 MR. PAGE: We'll start this Monday. So
12 they have one week to do that.

13 THE COURT: Is that enough time.

14 MR. GEORGE: I don't believe it is, Your
15 Honor, and I'm not playing coy.

16 The production that would be necessary would
17 be the input data, the executables, which is what the
18 model runs on, and the output data. That's going to
19 be spreadsheets that have tens of thousands of lines
20 associated with them.

21 THE COURT: Do you need to call
22 Dr. Bierman to find out how much time it would take
23 him if he gets it on Monday?

24 MR. GEORGE: I'm happy to place that
25 call.

1 THE COURT: Let's take a break and find
2 out.

3 (Short break)

4 THE COURT: Mr. George.

5 MR. GEORGE: Your Honor, I have been
6 unable to get a hold of Dr. Bierman, but I've come to
7 the conclusion that given where we are in this trial,
8 we'll do whatever is necessary to be ready to
9 cross-examine Dr. Engel if he is recalled.

10 We would ask for an immediate production of
11 the modeling files. They exist and they could be
12 loaded to an FTP site, I believe, promptly so that we
13 have the maximum amount of time with them.

14 I would also request, Your Honor, that given
15 that -- if the court is inclined to allow Dr. Engel to
16 testify as to a new model run that hasn't been
17 reviewed by our experts, that the defendants be given
18 leave to have Dr. Bierman present and, if necessary,
19 to put him on the stand for 15 or 20 minutes to
20 comment on that discreet issue. I understand there
21 may be a broader range of things that Dr. Engel may
22 seek to testify about.

23 But we do think it would be perhaps expecting
24 more of attorneys than is realistic to think that in
25 cross-examination I could cover this highly technical

1 ground without some assistance from Dr. Bierman.

2 THE COURT: Well, it is technical and
3 that in part informs the court's view on this issue
4 because it has become a focus here of some of the
5 defendants' experts' testimony.

6 Well, that raises two logistical issues.
7 Number one, Mr. Page can that run be provided to
8 Mr. George today or tomorrow?

9 MR PAGE: Your Honor, during the break,
10 I got a hold of Dr. Engel, he's now in class. I asked
11 him if I could have it to the defendants' counsel by
12 Monday and he said no problem. What I expect is that
13 we could probably get them to them Saturday is my
14 expectation or Friday afternoon. I just have to get
15 back in touch with Mr. Engel.

16 THE COURT: You say it's already been
17 done?

18 MR PAGE: Yes. And Dr. Engel says, what
19 I'd like to do is clearly label by input, so we don't
20 have this question of what files are which again, and
21 have it ready then to be delivered to the defendants.
22 But the runs have been done, they just need to be
23 labeled, the files.

24 THE COURT: All right. Well, given some
25 of the testimony with regard to the organization of

1 the files, obviously the defense won't have any
2 objection to labeling those so that they know what the
3 figures represent.

4 Let me just order you then to get that to
5 Mr. George as soon as possible and preferably sent out
6 tomorrow, which then would presumably get to
7 Mr. George by Saturday.

8 Now, with regard to --

9 MR. PAGE: Your Honor, may I comment on that?

10 THE COURT: Yes.

11 MR PAGE: Mr. George asked me to put it
12 on an FTP site so it wouldn't even be an overnight
13 delivery. If that's possible, we will do that. So if
14 I have the files from Dr. Engel tomorrow and we can
15 load them into an FTP site. My understanding is
16 they're Excel and files, and I think they're easily
17 loadible up into an FTP site and we will do that.

18 THE COURT: All right. Now, the second
19 issue, possible surrebuttal. Do you wish to address
20 that or Ms. Moll?

21 MR PAGE: I'll have my lawyer address
22 that, Your Honor.

23 MS. MOLL: We obviously, Your Honor,
24 have no objection to Dr. Bierman being in the
25 courtroom when Dr. Engel testifies in rebuttal. I

1 think the question of whether he should be able to
2 testify in surrebuttal is a question that does not
3 need to be answered today.

4 THE COURT: I think that's probably
5 right.

6 MS. MOLL: And we can address it
7 immediately following the conclusion of Dr. Engel's
8 testimony.

9 MR. GEORGE: Your Honor, I'm agreeable
10 to that approach. We will -- absent Dr. Bierman being
11 on vacation, which might be possible and may explain
12 why I couldn't get him, we'll have him present in the
13 courtroom. If we believe it's necessary, we'll seek
14 leave at that time and Your Honor can rule on it based
15 upon the record.

16 Your Honor, I guess the last point that I
17 would want to get some clarity around, Ms. Moll had
18 indicated that she thought that the testimony on
19 rebuttal would take about a day and a half. Candidly,
20 if we hold tightly to the discreet points listed in
21 their filing, which are very, very narrow, I mean,
22 their specific responses, certainly it's the
23 defendants' expectation we're going to say tightly to
24 those subjects as opposed to putting a witness up to
25 bolster prior testimony or, you know, free range on

1 topics. I don't believe it will necessarily take a
2 full day and a half.

3 So I wanted to kind of surface that concern
4 and the defendants' expectation, and I hope the
5 court's, that we're going to police the line to find
6 in those disclosures during the rebuttal case. That's
7 certainly our expectation.

8 THE COURT: Well, I'll certainly review
9 the transcript testimony specifically set forth in the
10 State of Oklahoma's submission filed today, the 2854,
11 and we'll attempt to hold the line there with regard
12 to rebuttal --

13 MR. GEORGE: Thank you, Your Honor.

14 THE COURT: -- and cross-examination.

15 MR. GEORGE: Certainly, Your Honor.

16 One more finally -- there's always two
17 "finallys" and I apologize -- someone suggested to me
18 that we probably should get some clarity around moving
19 straight from the rebuttal case to closing, and that's
20 the defendants' view as to what would be most logical
21 and helpful. We're preparing with that understanding
22 in mind, but obviously did not want to presume the
23 court's planning and schedule. So --

24 THE COURT: How much time do we
25 anticipate for the end of the state's rebuttal case

1 and the filing of findings and conclusions?

2 MR. GEORGE: Your Honor, I believe the
3 court had previously indicated about ten days -- is
4 that right? -- that the parties were to make
5 submissions within ten days, and we've been working on
6 that understanding. Obviously, there will be some
7 time necessary to incorporate any rebuttal testimony
8 into those findings.

9 One concern that I have -- and I might be
10 speaking for all of the defendants; and if I'm not,
11 they should certainly jump up -- is if we delay
12 closing until after the submissions of those findings
13 of fact and conclusions of law, that I am concerned
14 that closing will turn into an argument as to the
15 appropriateness of those findings as opposed to what
16 we think would be more helpful, a traditional closing,
17 a big picture summarizing the things that we think are
18 important. I would certainly hope we would not end
19 this case with a procedural skirmish over specific
20 line items in proposed submissions.

21 THE COURT: Well, that's a good issue, a
22 good question.

23 Mr. Bullock, I think you were the one who
24 suggested --

25 MR. BULLOCK: Well --

1 THE COURT: -- the closing after the
2 filing of findings and conclusions.

3 MR. BULLOCK: I still think that that's
4 most helpful. The spector that Mr. George raises, of
5 course, is that one of our two sides will do something
6 that is ineffective in closing; that is, get into the
7 weeds and the grass and lose focus.

8 THE COURT: If you do that, you're
9 wasting your time.

10 MR. BULLOCK: Then you're wasting your
11 closing.

12 THE COURT: Especially if I tightly
13 circumscribe the time.

14 MR. BULLOCK: And what we want you to do
15 is listen to us, and so there's a certain incentive
16 there to try to do it right. Whether we do or not
17 remains to be seen.

18 I think it will be helpful to us for another
19 very practical reason. We're going to be working very
20 hard on the findings. If we end up two-tracking, take
21 lawyers away from doing that right, in order to assist
22 myself and the others who will be doing the closing,
23 frankly we're going to be stretched thin on this side.

24 THE COURT: I think that's right. And
25 maybe I misread some of your statements here, but you

1 heard my reference to your continuing to focus on what
2 the precise issues are here, and of course that's what
3 a trial does. So I'm inclined to favor Mr. Bullock's
4 suggestion. I think to focus on the findings and
5 conclusions is wise.

6 Ten days, I presume, would be counting the
7 interim weekend, which would put the date, assuming
8 that we complete rebuttal on the 26th, and the motions
9 then might take a short amount of time thereafter,
10 that would put the deadline for findings and
11 conclusions on February 5th.

12 MR. GEORGE: I think that math is
13 correct, Your Honor.

14 One other observation -- and obviously the
15 defendants will do whatever is most -- the court
16 believes is most helpful in terms of the order. If
17 Your Honor desires to proceed with findings before
18 closing, we'll certainly obviously adhere to that.

19 But one other consideration that I think is
20 important here is the mobilization of attorneys and
21 resources for two trips as opposed to one trip. And
22 obviously the course that we're headed down, at least
23 in the suggested proposal by Mr. Bullock, means that
24 we'd have to repopulate Tulsa next week -- or the week
25 after next for the rebuttal case and then bring those

1 resources back again the following week.

2 THE COURT: Although, I don't know that
3 you need to move in for the close. I anticipate that
4 we will confine close to one day.

5 MR. GEORGE: Right.

6 THE COURT: So you need not, you know,
7 pack for an extended stay.

8 MR. GEORGE: Certainly, Your Honor.
9 We'll not allow anyone to book a room at the Mayo for
10 the entire week for closing, as luxurious as it is and
11 we're pleased to have stayed there, but obviously
12 there is attendant travel costs and time with
13 mobilizing attorneys. I understand in the scale of
14 this case that that might not outweigh the
15 considerations you have in mind in terms of what will
16 be most useful.

17 But as a shareholder of Tyson Foods, I feel
18 compelled to raise it but it is an added expense that
19 I hope would be part of the consideration. So --

20 THE COURT: Well, I'll leave it to you
21 as to how many folks you need for closing. I don't
22 know that we need this army, but then of course the
23 plaintiffs did sue quite a number of defendants.

24 Mr. Tucker.

25 MR. TUCKER: Your Honor, there's one

1 other matter that we didn't discuss.

2 When Your Honor talked about the rebuttal
3 issue, Dr. Wells was also suggested for rebuttal and
4 you'll recall Dr. Wells had modeling also.

5 THE COURT: Yes.

6 MR. TUCKER: And Mr. Ehrich would like
7 the address the same kinds of issues that exist with
8 Dr. Wells -- or may exist with Dr. Wells that exist
9 with regard to Dr. Engel. But there have been zero
10 disclosures with regard to Dr. Wells even though he
11 will be brought on at the same time.

12 THE COURT: Good point. Is Wells going
13 to perform any new modeling?

14 MR. PAGE: No, Your Honor.

15 MR. TUCKER: I'm sorry. I didn't hear,
16 Your Honor.

17 THE COURT: He said no.

18 MR. PAGE: No.

19 MR. TUCKER: May we inquire as to when
20 we would expect disclosures from Dr. Wells? Since we
21 would like the same length of time to prepare for him
22 as for Dr. Engel since they're interrelated.

23 THE COURT: I suspect the response is,
24 the disclosures are here in 2854. But Mr. Page?

25 MR. PAGE: That's a pretty good

1 disclosure, Your Honor. If there's any demonstratives
2 or exhibits, they'll be 72 hours before Monday, the
3 25th.

4 THE COURT: Well, let's do it a little
5 bit before that, I mean, since we have all this time.
6 Is there any reason why that couldn't be done by
7 Tuesday or Wednesday of next week?

8 MR. PAGE: I don't believe so, Your
9 Honor. I talked to Dr. Wells yesterday. I believe
10 he's available to give me any information in that
11 regard. So could we say Tuesday of next week, Your
12 Honor?

13 THE COURT: Yes. Is that satisfactory?

14 MR. TUCKER: Yes, Your Honor. Thank
15 you.

16 THE COURT: All right. Anything else?

17 MR. GEORGE: Your Honor, I apologize.
18 But there's been one other suggestion made, which I
19 think is an outstanding one, by Mr. Weeks and I wanted
20 to bring it to the court's attention. It might
21 provide a nice balance of the cost considerations that
22 I've raised and the court's view on what would be most
23 useful and also eliminate -- or lessen some of the
24 prejudice associated with new analysis.

25 Would it be possible to move the rebuttal

1 case and the closing to the same week, move it two
2 weeks? And that way --

3 THE COURT: Well, then you will not have
4 had the opportunity to use the rebuttal in preparing
5 the findings and conclusions so that's not possible.
6 And I need to rule on the two remaining aspects of the
7 52(c), which I now can do and actually hopefully focus
8 on between now and rebuttal, and then there will be
9 motions at the close of rebuttal.

10 THE COURT: Yes. Mr. McDaniel.

11 MR. MCDANIEL: Yes, Your Honor. I just
12 wanted clarity. What date -- or has the court decided
13 on the date for closings? I heard February 5th as
14 when the court wants to receive the proposed findings.

15 THE COURT: We haven't gotten there, no,
16 sir.

17 MR. MCDANIEL: Because I know we all,
18 and certainly the court, want to schedule around that.
19 So hopefully we can resolve that today.

20 THE COURT: Mr. Overton, if findings and
21 conclusions come in by February 5th -- I know February
22 doesn't look very good because all my work has now
23 been passed to February -- do we have any day
24 available?

25 *(Discussion held off the record)*

1 THE COURT: I take it for airline
2 schedules for both plaintiff's counsel and defendants'
3 counsel from the East Coast, the 11th would be a
4 better day than the 12th?

5 MS. MOLL: It doesn't matter to us, Your
6 Honor.

7 THE COURT: All right.

8 MR. JORGENSEN: Yes, sir.

9 THE COURT: All right. Let's do it
10 February 11th and we'll plan to use that day.

11 All right. Anything further? Ms. Moll.

12 MS. MOLL: Very quickly. You mentioned
13 that you would be referencing the transcript pages
14 that we cited in our submission of last night at
15 docket No. 2854.

16 THE COURT: Yes.

17 MS. MOLL: I have a copy already
18 printed. To save at least part of a tree, I thought
19 I'd pass it up.

20 THE COURT: Oh, thank you very much. Is
21 there anything further?

22 MS. HILL: Your Honor, if I may,
23 Mr. Overton reminded me I need to clarify the record
24 with respect to our discussion yesterday. So I am
25 formally moving to admit Defendants' Exhibit 1191-C,

11276

1 which is our informal transcription of the video clip
2 that was shown to Dr. Olsen that we discussed on the
3 cattle and the riparian area, so for the record you
4 can deny my motion to admit Defendants' Exhibit
5 1191-C. So I hereby move for the admission of 1191-C.

6 THE COURT: All right. Frankly, it's
7 out of mind. But any objection?

8 MR. BULLOCK: No objection to the
9 denial, Judge.

10 THE COURT: Very well.

11 *(Discussion held off the record)*

12 THE COURT: All right. Based upon
13 Mr. Overton's representation to me that basically all
14 we're doing is clarifying the denial that was made on
15 the record yesterday, the Cargill's motion to admit
16 Defendants' Joint Exhibit 1191-C is denied.

17 MS. HILL: Thank you, Your Honor.

18 THE COURT: Anything further?

19 MR. BULLOCK: No, sir.

20 THE COURT: We're adjourned.

21 *(The proceedings were recessed)*

C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Eastern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 14th day of January 2010.

s/ Brian P. Neil

Brian P. Neil, CSR-RPR, CRR, RMR
United States Court Reporter